Supreme Court, U. S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-811

CLAIBORNE HARDWARE CO., *et al.*,
Petitioners,
v.
AARON HENRY, *et al.*, UNITED STATES OF AMERICA, AND MISSISSIPPI ACTION FOR PROGRESS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AARON HENRY, NAACP, MISSISSIPPI STATE CONFERENCE OF NAACP, AND COAHOMA COUNTY BRANCH OF NAACP

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OPINIONS BELOW

The opinion of the court of appeals is reported at 595 F.2d 291 and is reprinted at 1a in the appendix to the petition (Pet. App.). The opinion of the district court is reported at 424 F. Supp. 633 and is reprinted at Pet. App. 46a.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1979. A petition for rehearing en banc was denied on August 6, 1979. After an extension of time was granted by Mr. Justice Powell, the petition for a writ of certiorari was filed on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the first amendment to the United States Constitution, 42 U.S.C. § 1983, and Miss. Code Ann. §§ 11-51-3 and 11-51-31, all appearing in the petition at 4-6, the following provisions are involved:

28 U.S.C. § 1331(a)

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(3)

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Miss. Code Ann. § 11-51-43 (1972)

> In any case of an appeal to the supreme court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment or decree appealed from or by the judge thereof, or by the supreme court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order for a supersedeas.

STATEMENT OF THE CASE

On August 9, 1976, a Hinds County, Mississippi Chancery Court issued a broad injunctive order and damage award against numerous individual defendants and the

National Association for the Advancement of Colored People (NAACP) (respondents here) in a civil action filed by certain Mississippi merchants (petitioners here). The injunctive order prohibited the NAACP from engaging in any oral advocacy, picketing, or other boycott-related activities designed to protest racial discrimination. The damage award amounted to approximately $1.25 million. It was based on injuries alleged to have been caused to the merchants by the NAACP's previous boycott-related protests.

On August 30, 1976, respondents perfected their right to appeal the Chancery Court's injunction and damage award to the Mississippi Supreme Court. However, under Mississippi law trial court judgments become immediately enforceable upon entry. The Chancery Court's injunctive order could be stayed only at the discretion of the trial judge (or the Mississippi Supreme Court), and the damage award could be stayed only by the posting of a bond in an amount equal to 125% of that award. Miss. Code Ann. §§ 11-51-3, 11-51-31, 11-51-43. Accordingly, on September 24, 1976, respondents moved the Chancery Court, on both statutory and constitutional grounds, to stay its injunctive order pending appeal and to grant supersedeas either without bond or with reduced bond. Respondents contended that a failure to stay the judgments against them, pending appeal to the Mississippi Supreme Court, would irreparably injure their first amendment rights.

On September 30, 1976, the trial court denied respondents' motion. The next day, respondents appealed this denial to the Mississippi Supreme Court, where they again contended that failure to stay the lower court's judgment would deprive them of constitutionally protected rights before full appellate review could be obtained. The same day, the Mississippi Supreme Court denied relief.

On the day the Mississippi Supreme Court refused to stay the Chancery Court's injunctive and damage orders, respondent NAACP, on behalf of itself and the numerous individual defendants in the Chancery Court proceedings, sought relief from those orders in the federal district court for the Northern District of Mississippi. On October 1, 1976, that court issued a temporary restraining order, and on October 20, 1976, a preliminary injunction, each prohibiting petitioners from enforcing the Chancery Court's judgment pending its review by the Mississippi Supreme Court (and, if necessary, by the United States Supreme Court).

The district court's stay was issued pursuant to 28 U.S.C. §§ 1331(a), 1343(3) and 42 U.S.C. § 1983. It was based on the court's findings that certain portions of the state court's broad injunctive order were so sweeping as to raise serious questions about the injunction's constitutionality, that the Mississippi Supreme Court was likely to overturn these portions of the injunction on appeal and that, since the appeal might take two to three years to pursue, respondents would in the interim suffer irreparable injury to their first amendment rights. In addition, contrary to petitioners' assertion (at 20) that respondents have the "financial ability to post a supersedeas bond," the courts below found that either the execution of the $1.25 million judgment or the posting of the $1.56 million supersedeas bond would effectively bankrupt the NAACP and bring the further exercise of its first amendment rights to a virtual halt. Pet. App. 22a, 28a, 29a, 56a. Moreover, even if respondents had been able to post the supersedeas bond, it would have precluded execution only of the damage portion of the state court's judgment. A stay was required to prevent the immediate enforcement of the state court's injunctive order against respondents.

The stay granted by the district court was temporary and limited. It did not affect those portions of the state

court's injunction prohibiting violence, threats, or other coercion, but was restricted only to activities which the court found to be clearly within first amendment protections. It was conditioned on respondents' posting a bond of $110,000 to protect petitioners against any harm that the stay might cause them. Pet. App. 63a. Finally, as the court expressly noted, the relief granted to respondents "d[id] not contemplate interference with the proceedings in the state court" and was intended to last

> only for that period necessary to permit an exhaustion of appellate remedies. The final decree of the state court is now the subject of review by the [Mississippi] Supreme Court. The appeal has been perfected and the state court defendants have complied with the cost bond requirements fixed by the state court. The appeal will take its usual course through the state's appellate procedure and because of the complexity of the issues involved there will be several years involved in this process.

Pet. App. 50a. On May 21, 1979, the Court of Appeals for the Fifth Circuit unanimously affirmed the district court's decision. Pet. App. 42a-43a. The present petition followed on November 23, 1979.

REASONS FOR DENYING THE WRIT

Petitioners have asked this Court to review four questions which they contend are raised by the court of appeals' decision. The present respondents will address only three of these, since the fourth applies exclusively to another respondent, the United States.

As will be discussed, none of the three questions urged by petitioners is actually presented by this case. Moreover, even if the questions were squarely presented, petitioners have advanced no reason why this Court need consider them. Petitioners allege no conflict among the

circuits on these questions. They show no departure from this Court's decisions in the lower courts' resolution of the asserted questions, nor any justification for this Court to overrule its precedents which control those questions. They make no suggestion or demonstration that the peculiar facts giving rise to the questions will often, if ever, confront other lower courts. Finally, petitioners fail to consider that the questions, even if otherwise worthy of review, might well be mooted before they could be heard and resolved by this Court.

1. Petitioners first ask this Court to decide whether the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), applies to purely private civil actions. Even if that question merited review, it would be inappropriate to reach it in this case.

Younger and its progeny require the federal courts to refrain from enjoining certain state court proceedings "when litigation between the same parties and raising the same issues is or apparently soon will be pending" in those very proceedings. *Trainor* v. *Hernandez*, 431 U.S. 434, 440 (1977). A "necessary concomitant" of this requirement is that "a party . . . must exhaust his state appellate remedies before seeking relief in the District Court . . . ." *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 608 (1975). These requirements serve two essential purposes. The first recognizes that equitable intervention by a federal court is inappropriate where a party has an adequate remedy at law in a pending state court proceeding. The second, based on a respect for federal/state comity, assures that state courts in which federal issues are pending will be given an opportunity to hear and resolve those issues before resort is made to the federal courts. *Trainor* v. *Hernandez*, *supra*, 431 U.S. at 440-44; *Juidice* v. *Vail*, 430 U.S. 327, 334-35 (1977); *Huffman* v. *Pursue, Ltd.*, *supra*, 420 U.S. at 600-01; *Younger* v. *Harris*, *supra*, 401 U.S. at 43-44.

Petitioners request the Court to determine whether these *Younger* precepts apply to a case such as this, "a civil action between private parties in which the state is not a party." Petition at 3. On the facts presented here, the question is academic. Whether or not *Younger* applies to this case, its requirements were strictly observed and its purposes fully achieved. As both lower courts made clear, the sole issue entertained by the federal district court—whether the first amendment necessitated a stay of the Chancery Court's judgment pending appellate review—was in fact presented to the Chancery Court and thereafter appealed to the Mississippi Supreme Court. Pet. App. 7a-8a, 20a-21a, 55a. That is, the District Court's injunction issued only *after* exhaustion of every opportunity afforded by Mississippi for consideration of the questions raised by respondents' motion for the stay. Those questions are not the same as the issues on the merits of the pending state appeal. *See National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977). The federal court's treatment of the issue of the stay has neither usurped the Mississippi courts' authority to adjudicate the appeal on the merits nor interfered with those courts' proceedings concerning that appeal. Thus, *Younger* was strictly adhered to, and the question of its applicability to "all civil actions" does not arise.

Even if the asserted question was properly presented by this case, petitioners have suggested no reason why it should be considered. In most recent treatment of the *Younger* doctrine only six months ago, this Court declared that "we do not remotely suggest 'that every pending proceeding between a state and federal plaintiff justifies abstention . . . .'" *Moore* v. *Sims*, 99 S.Ct. 2371, 2377 n.8 (1979). Instead, the Court held that *Younger* applies only to those cases where important state interests are involved. *Moore* v. *Sims*, *supra*, 99 S.Ct. at 2377. No reason is offered why this Court should now consider abandoning that test, nor why this case is an appropriate

vehicle for such an abandonment. Neither do petitioners establish that an "important state interest" is at stake in this private civil litigation; to the contrary, as the court of appeals found, the only state interest present in this litigation is the minimal one which the state necessarily has in every civil action—providing "forums for the orderly resolution of private conflicts." Pet. App. at 20a. Furthermore, far from alleging any conflict in the circuits concerning the lower courts' application of *Younger*, petitioners assert at 11-12 that the lower courts have been uniform in their adherence to the test established by this Court. Petitioners' assigned question should not be entertained.

2. Petitioners next ask this Court to decide whether the "mere entry" of an appealable state court judgment constitutes "state action" for purposes of 42 U.S.C. § 1983. That broad question is simply not presented here. As the opinion below specifically explained, state action was involved here only because the Chancery Court's ruling, unlike most state lower court decisions, was immediately enforceable. Pet. App. 14a-15a; p. 3, *supra*. Had the district court not issued its injunction, state officials could have immediately begun enforcing the Chancery Court's injunction against activities protected by the first amendment and implementing garnishment or execution proceedings to collect the judgment from the NAACP and the individual defendants. Thus, petitioners' exaggerated "prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts" is unwarranted. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). Rather, as this Court has cautioned, the presence of state action "can be determined only in the framework of the peculiar facts and circumstances" presented in each particular case. *Id.* The peculiar facts involved in this case were characterized by the court

below as "unique," Pet. App. 15a, are unlikely to recur, and are not at all susceptible to the far-reaching issue petitioners present.

Even if this case fairly presented the assigned issue, petitioners have not shown that it should be reviewed. Petitioners do not attempt to demonstrate a conflict among the circuits, but claim instead that the ruling below conflicts with this Court's opinion in *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978). In fact, *Flagg* fully supports the decision below. There, this Court held that a warehouseman's proposed private sale of a customer's goods did not constitute state action because the actions of the private party in *Flagg* did not involve the direct authority or participation of the state. At most, the state did no more than decide *not* to act to interfere with a private party's use of a self-help remedy. *Id.* at 165, 166.

In contrast, as the decision in *Flagg* itself makes clear, the circumstances in this case do involve state action. Unlike the warehouseman in *Flagg*, petitioners did not simply employ "private means permissible under [state] law" against respondents. *Id.* at 160-61 n.10. Instead, petitioners have "invoked the authority of the [Mississippi] court" and the full law enforcement machinery of the state in an effort to enjoin respondents and to seize their funds. *Id.* This is precisely the type of activity repeatedly recognized by this Court to be state action. *Id.* *Accord*, *New York Times* v. *Sullivan*, 376 U.S. 254, 265 (1964); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Indeed, the holding in this case is more narrow than decisions such as *Shelley* and *New York Times*, both because of the particular factual circumstances involved in those cases and because, unlike *Shelley*, the state court here has not simply enforced private rights secured by contract, but has instead, as in *New York Times*, "applied a state rule of law which [respondents] claim to impose invalid re-

strictions on their constitutional freedoms." 376 U.S. at 265. Certiorari is not warranted concerning this issue.

3. In their final question directed toward the present respondents, petitioners ask the Court to decide whether an original complaint can "confer jurisdiction" on a court after a superseding complaint has been dismissed. Petition at 22. The stated question is not of sufficient significance to warrant certiorari. More importantly, it is not even presented by the lower court decision now before this Court. The preliminary injunction here under review was issued in October, 1976. Its factual basis was respondents' amended complaint of unconstitutional state action presented by immediate execution of the August 1976 Chancery Court judgment; its jurisdictional basis is 28 U.S.C. §§ 1331(a), 1343(3) and 42 U.S.C. § 1983. The question now raised by petitioners—the continuing validity of the "original complaint" in this case and a December, 1969 injunction based on that complaint—has no bearing on the stated factual and jurisdictional basis of the district court's October, 1976 injunction. Furthermore, petitioners' question was addressed and decided by the court of appeals the last time the parties were before that court. 444 F.2d 1300, 1305-06 & nn. 4-9 (5th Cir. 1971) (Pet. App. 77a-80a), *cert. denied*, 405 U.S. 1019 (1972). Petitioners have offered no reason why that settled question should now be reopened.

4. Finally, there is another reason why the writ should not be granted: there is a substantial chance that the assigned questions will be mooted before this Court could decide them. As the pleadings make clear, the judgment which was stayed by the district court is now before the Mississippi Supreme Court on its merits. Petitioners' appeal brief was filed with that Court on August 29, 1979; respondents' brief is due January 19, 1980. Should the Mississippi Supreme Court rule favorably for respondents, as both the district court and court of appeals have found likely, the district court injunc-

tion here at issue will expire. If that occurs, it seems doubtful that this Court could issue its own decision (after briefing and oral argument) before the injunction's validity is mooted by the impending decision of the Mississippi Supreme Court. In such circumstances, since this Court would in any event not pass on the validity of an injunction that had terminated or already served its purpose, *see DeFunis* v. *Odegaard*, 416 U.S. 312, 317-20 (1974); *Sears, Roebuck & Co.* v. *Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers Local 419*, 397 U.S. 655, 657-58 (1970), the writ should not be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1979, three copies of the foregoing Brief in Opposition of Respondents Aaron Henry, NAACP, Mississippi State Conference of NAACP, and Coahoma County Branch of NAACP were mailed by first class mail, postage prepaid, to:

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